

**The Texas Commission on Environmental Quality's (TCEQ) Response to
Title VI Complaint Nos. 05RNO-22-R6 and 06RNO-22-R6**

Executive Summary

TCEQ appreciates the opportunity to respond to the allegations made by Harris County and Impacted Communities (Super Neighborhood 48 Trinity/Houston Gardens, Dyersforest Heights Civic Club, Progressive Fifth Ward Community Association, and Prince Square Civic Association) (Complainants) in their complaints under Title VI of the Civil Rights Act of 1964 (complaints) to the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) regarding TCEQ's 2021 change to the Concrete Batch Plant Standard Permit (CBPSP).¹

According to EPA's August 3, 2022 letter accepting the complaints, EPA has accepted the following issues for investigation:

1. "Whether TCEQ's criteria or methods of administering its Concrete Batch Plant permitting process for concrete batch plants in Harris County, Texas, including its adoption of the 2021 Amended CBPSP, has the effect of subjecting persons to discrimination on the basis of race or national origin in violation of Title VI and EPA's implementing regulation at [Title 40 Code of Federal Regulations (40 CFR)] Part 7; and
2. Whether TCEQ discriminated on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964 and EPA's implementing regulation at 40 CFR Part 7 by failing to provide meaningful public participation to persons with limited English proficiency in connection with the issuance of the 2021 Amended CBPSP."

TCEQ denies generally that it discriminates against any individual or community in any of its actions, including the administration of its CBPSP. TCEQ incorporates by reference portions of its responses to prior EPA complaints (2019 complaint and Oxbow complaint)² as they pertain to the issues in the current complaints, especially issues regarding public participation and air quality permitting actions.

TCEQ Response to Issues Accepted by ECRCO for Investigation

Generally, both complaints allege the same violations of Title VI on the part of TCEQ, and therefore, we will address both complaints together in this response. The complaints generally allege that TCEQ's CBPSP is not protective of human health and the environment and disproportionately impacts the residents of Harris County and the Impacted Communities. The complaints also maintain that TCEQ failed to follow proper procedures when the agency amended the standard permit in September 2021, and that this failure caused disproportional harm to the residents of Harris County and the Impacted Communities. Further, the complaints allege that TCEQ failed to provide proper notice to Limited English Proficient (LEP) communities and that TCEQ continues to fail to meet its Title VI obligations for equal access to LEP communities in its processes.

¹ TCEQ Docket No. 2021-0493-MIS, Non-Rule Project No. 2021-016-OTH-NR.

² EPA File Nos. 02NO-20-R6 and 02R-21-R6; TCEQ Response letter for File No. 02NO-20-R6 dated Jan. 6, 2020; and TCEQ Response letter for File No. 02R-21-R6 dated Dec. 15, 2021.

*The Texas Commission on Environmental Quality's (TCEQ) Response to
Title VI Complaint Nos. 05RNO-22-R6 and 06RNO-22-R6*

1. **TCEQ response to accepted issue 1: TCEQ's administration of its concrete batch plant permitting process for concrete batch plants in Harris County, Texas, including its 2021 CBPSP Amendment, does not cause disparate impact to individuals on the basis of race or national origin in violation of Title VI and 40 CFR Part 7.**

The CBPSP was originally effective on September 1, 2000. The CBPSP was amended in 2003 and subsequently amended in 2012. The 2012 amendment inadvertently removed the exemption from emissions and distance limitations in Title 30 Texas Administrative Code (30 TAC) § 116.610(a)(1), which requires a standard permit, including CBPSPs, to meet the emission limitations in 30 TAC § 106.261 (for permits by rule) unless otherwise specified by the provisions of that standard permit.³ A waiver from the requirements of 30 TAC § 116.610 was a part of the original CBPSP.⁴ In fact, the original standard permit explains that emissions calculations are not required because “the extensive protectiveness review addressed emission rates and distance limitations for these facilities.”⁵ Therefore, the emissions calculations and comparisons to the tables in 30 TAC §§ 106.261 & 106.262 are not necessary because an applicant who follows the requirements of the standard permit will not meet or exceed those limits. Essentially, the limits of the standard permit serve as limits on emissions that might need to be compared to those tables, and therefore, the emissions calculation worksheets are not required. While the 2012 review of the standard permit contemplated the exemption, and the exemption was a part of the permit based on the 2012 protectiveness review, during the final publication of the CBPSP the exemption was inadvertently omitted. The 2021 amendment reinstated the exemption that previously had been a part of the CBPSP before this administrative error.

- A. TCEQ administers and enforces the CBPSP in compliance with the federally approved State Implementation Plan (SIP), TCEQ rules, and the Texas Water Code (TWC), which are protective of human health and the environment.

Once a registration for authorization under the CBPSP is received, TCEQ staff will determine whether the application contains all the required information, or, in agency terminology, whether the application is “administratively complete.” Once agency staff confirm that the permit is administratively complete, the applicant must publish the public notice, which is titled “Consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision.” The notice includes information on where the facility is located, the contaminants that would be emitted, and where the public can find information about the registration. At this point, TCEQ staff begin the technical review of the permit to determine if the applicant’s operation, as represented in its application, would comply with the standard permit. If the standard permit application has substantial public interest, or if a legislator requests a public meeting, the agency will hold a public meeting where members of the public may ask questions and submit formal comments on the application. TCEQ will draft a response to public comment and address all comments

³ TCEQ, *Amendment to the Air Quality Standard Permit for Concrete Batch Plants*, <https://www.tceq.texas.gov/assets/public/permitting/air/NewSourceReview/Mechanical/cbpsp-bkg-92221.pdf>, p. 1, Sep. 2021.

⁴ TCEQ Air Quality Standard Permit for Concrete Batch Plants, December 2000.

⁵ *Id.*

*The Texas Commission on Environmental Quality's (TCEQ) Response to
Title VI Complaint Nos. 05RNO-22-R6 and 06RNO-22-R6*

received. State statute requires TCEQ to issue a permit if the application complies with the terms of the standard permit.⁶ Commenters may also request a contested case hearing (CCH), which is an administrative hearing held before the State Office of Administrative Hearings (SOAH). For an application to be sent to SOAH for a CCH, a commenter must demonstrate that they have an interest affected by the application that is not common to the general public, and, for the CBPSP, that they permanently reside within 440 yards of the proposed plant. The CCH process is a feature of the Texas permitting process that is provided for in state law.

TCEQ operates its air quality permitting program, including its minor new source review (NSR) program, without regard for socioeconomic factors.⁷ TCEQ's program is operated in such a way as to protect the health of all communities, including those with vulnerable populations, as required by both federal and state statutes and regulations. The federal National Ambient Air Quality Standards (NAAQS) are designed to protect all populations, and TCEQ's SIP, including its NSR permitting program, has been fully approved by EPA.

B. Compliant operation within the terms of the CBPSP is protective of all populations.

Standard permits are air quality authorizations for specific, well-characterized classes of facilities that have similar operations, use the same pollution-control equipment, and produce similar, consistent emissions. The CBPSP was developed by the commission to ensure that operations authorized by the standard permit are protective of human health and the environment for all communities and populations in the state of Texas. TCEQ conducted a protectiveness review when creating the CBPSP and when it was amended in 2012 to ensure emissions from the facilities are protective of public health and welfare. A protectiveness review is a demonstration using air dispersion modeling to evaluate the potential impacts of the proposed operation as represented in the standard permit. The protectiveness review helped establish maximum daily and annual production limits for the standard permit.

The protectiveness review considered numerous variables including emission source types and associated emission parameters; meteorological data; a receptor grid; and model use and techniques. TCEQ developed the protectiveness review based on modeling that was inherently conservative and over-predicts ground-level concentrations of emissions from the proposed facility. TCEQ applied the model in a screening mode to ensure predictions were conservative (i.e., higher predicted concentrations) and applicable for any location in the state. For example, the protectiveness review evaluated both rural and urban dispersion coefficients and the higher of the two options was used as the maximum predicted concentration for developing the standard permit conditions. In addition, all emissions sources were co-located in order to minimize bias due to source configuration and wind direction. This technique also provides conservative results since the impact from all sources is

⁶ See, Texas Health & Safety Code (THSC) § 382.0518(b) stating that “the commission shall grant within a reasonable time a permit or permit amendment...” and THSC § 382.05195, which details when the commission may issue a standard permit.

⁷ Standard permits, including CBPSPs, are issued under the SIP-approved rule in 30 TAC Ch. 116, Subchapter F, and are part of TCEQ approved minor NSR permitting program.

*The Texas Commission on Environmental Quality's (TCEQ) Response to
Title VI Complaint Nos. 05RNO-22-R6 and 06RNO-22-R6*

maximized. The results of the protectiveness review using the maximum production limits show that the standard permit is protective based on the effects screening level guidelines and ambient air standards for the contaminants typically emitted from a concrete batch plant (e.g., particulate and products of combustion). That protectiveness review determined the terms of the standard permit. Therefore, if concrete batch plant operations comply with the terms of the standard permit, then emissions from the plant are not harmful to human health and the environment.

The commission has been updating its protectiveness review again as part of its efforts to address concerns over the CBPSP. Protectiveness reviews are designed to be conservative and to ensure protectiveness with an adequate margin of safety. Updated inputs to the model used for the protectiveness review reflect improved understanding of the emissions from these types of plants, as well as potential impacts related to changing background concentrations of pollutants. Periodic updates to such information help the agency to ensure that its CBPSP remains protective.

After enactment of Title VI, Congress passed the Federal Clean Air Act (FCAA) to provide a comprehensive framework for ensuring that the public is protected from air emissions. As co-regulators, TCEQ works closely with EPA in its administration of these federal programs in the state of Texas. EPA sets limits on emissions of pollutants through NAAQS, which TCEQ adheres to when issuing permits. In developing the CBPSP, TCEQ ensured that authorized emissions will be protective at and beyond the plant fence line. Because the NAAQS are designed to protect human health and the environment, when TCEQ applies all federal and state legal requirements—which it does in a non-discriminatory manner—all communities, including those closest to the plant, are protected. If these emissions limits are not sufficient to protect public health, then it is incumbent upon EPA to revise the NAAQS.

The CBPSP is focused on compliance with air quality standards (e.g., NAAQS). When emissions are protective at the fence line, they cannot create a disparate impact, and thus a review is unnecessary. To the extent that Complainants urge that the mere presence of a facility potentially impacts the Complainants in negative ways, TCEQ's air permitting authority does not allow it to consider or address land use, zoning, facility siting, or property values. In addition, no EPA rule requires the consideration of factors such as the location or socioeconomic status of surrounding communities in the evaluation of permit applications. The EPA-approved Texas standard permit rules simply require an evaluation of whether the proposed application complies with the terms of the standard permit, which is protective of human health and the environment.⁸ State regulatory agencies are required to administer their federally approved rules. Failure to do so—through consideration of factors other than the emissions limits necessary to protect public health—would leave states vulnerable to legal challenges from the regulated entities that rely on those rules.

When developing the CBPSP, TCEQ also evaluated the potential for cumulative or additive emissions at the facility. The updated protectiveness review that the agency is

⁸ See, THSC § 382.0518(b) stating that “the commission shall grant within a reasonable time a permit or permit amendment...” and THSC § 382.05195, which details when the commission may issue a standard permit. See also, 40 CFR § 52.2270(c), for EPA approval of 30 TAC Ch. 116, Subchapter F, Standard Permits, as part of the Texas SIP.

*The Texas Commission on Environmental Quality's (TCEQ) Response to
Title VI Complaint Nos. 05RNO-22-R6 and 06RNO-22-R6*

currently developing for additional changes to the CBPSP also includes evaluation and consideration of cumulative or additive emissions through inclusion of a conservative background factor that accounts for other sources of emissions, including other concrete batch plants. The commission included site-wide production limits in the permit to avoid the potential for cumulative emissions that would be higher than what is authorized by the standard permit. Multiple plants may be authorized under the standard permit so long as the permit holder complies with the production limits. In addition, distance requirements to the nearest rock crusher, concrete crusher, or hot mix asphalt plant were also added to avoid potential cumulative emissions higher than the permit limit. Therefore, the commission determined that a review of other off-site sources is not necessary when evaluating approval of any standard permit application. In addition, based on the results of the protectiveness review, no adverse impacts are expected to result from operations of multiple similar facilities, such as concrete batch plants, rock crushing plants, or hot mix asphalt plants.

C. The CBPSP is enforceable in accordance with the SIP.

Should an entity regulated by TCEQ fail to comply with the requirements of a standard permit, it can be subject to enforcement actions. There are several mechanisms by which TCEQ monitors compliance with permit conditions and state and federal regulations. Although specific to each site, investigations generally explore the entire operation of the plant to ensure compliance with applicable rules and regulations. Complaint investigations at these types of plants are usually unannounced, and no prior notification is provided to the plant, although notice may be given if necessary for safety reasons or to ensure that investigators have access to the site. The investigation may include an inspection of the site, including all equipment and control devices and a review of all required records.

If an investigation determines that a facility has allegedly committed a violation, then TCEQ can commence an enforcement action. An enforcement action can generally result in fines and/or corrective action. Under certain circumstances, an enforcement action can result in the loss of the permit or the suspension of operations if a facility is operating without a permit or under an expired permit. Generally, administrative and civil penalties up to \$25,000 a day may be assessed for each violation of TCEQ rules.⁹ Unpermitted facilities that do not hold *any* TCEQ permits are assessed an administrative penalty of \$10,000 for each day the plant is operating without a permit.

D. The complaints do not establish a causal connection between TCEQ's administration of its CBPSP and adverse impacts to public health and property values where racial and ethnic minorities, LEP communities, and low-income communities are located.

To support a violation using the disparate impact theory, ECRCO must 1) identify a specific policy or practice at issue, 2) establish adversity or harm, 3) establish

⁹ TWC Ch. 7.

*The Texas Commission on Environmental Quality's (TCEQ) Response to
Title VI Complaint Nos. 05RNO-22-R6 and 06RNO-22-R6*

disparity, and 4) demonstrate a causal connection between the specific policies or practices and the adversity or harm and disparity.¹⁰

TCEQ disagrees with ECRCO's expansive and unsupported view of its authority under Title VI to find that a state's implementation of and compliance with its federally approved programs can constitute discrimination. Without waiving objections to EPA's legal authority for its changing approach to civil rights enforcement, TCEQ denies that there is a factual and legal basis for a violation based on a disparate impact theory and makes the comments below in support of that position.

TCEQ does not have jurisdiction to consider issues such as zoning, land use, and land value for this type of authorization. Therefore, outside of limited set back provisions found in statute, TCEQ cannot regulate where applicants choose to operate facilities. Applicants consider many factors when determining where to locate a facility, including proximity to product needs. Concrete batch plants are particularly sensitive to location because concrete must be poured within a certain amount of time after it is mixed. TCEQ does not have control or jurisdiction over systemic land use issues in Harris County, including the lack of zoning in the city of Houston. The Complainants fail to adequately acknowledge these issues.

The Complainants widely attribute many negative health statistics in Harris County to the number of concrete batch plants in Harris County. This assumption ignores the myriad factors, wholly independent of facilities permitted by TCEQ to operate, that contribute to the negative health impacts the Complainants have alleged. These factors could include population density, poverty, poor access to preventative healthcare, local zoning ordinances (or lack thereof), and substandard housing conditions (e.g., residential crowding that increases stress, poor construction, improper ventilation systems, neglected plumbing lines). TCEQ cannot rationally be held responsible for disparities it did not create. These factors, all with potential to impact health, fall outside the purview and control of TCEQ.

As has been noted in this response, the city of Houston does not have zoning ordinances. This allows for industrial development, shopping centers, hospitals, and residential areas all within close proximity of each other. Many areas in the city have deed restrictions that limit facilities, such as a concrete batch plant, from operating. Because of this, many industries, including concrete batch plants, are forced to cluster into the unincorporated areas of the county, such as some of the neighborhoods named in the complaints. While TCEQ acknowledges these historic issues, state agencies do not have the jurisdiction or ability to resolve these systemic issues that originate at the local level. TCEQ cannot dictate how, or if, the city of Houston decides to regulate land use within its city limits. Nor does TCEQ have jurisdiction over private land use or property values. The FCAA, in part, establishes the NAAQS and SIP for air quality. TCEQ is tasked with implementing the NAAQS and SIP in accordance with applicable federal and state statutes and regulations.

¹⁰ EPA, *U.S. EPA's External Civil Rights Compliance Office Compliance Toolkit*, https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf, p. 8, Jan. 18, 2017.

*The Texas Commission on Environmental Quality's (TCEQ) Response to
Title VI Complaint Nos. 05RNO-22-R6 and 06RNO-22-R6*

Ultimately, TCEQ's CBPSP meets all federal standards and is protective of human health. TCEQ objects to ECRCO's attempts to expand the scope of its civil rights enforcement program through an untimely, ad hoc investigation without adequate prior notice to TCEQ of its specific obligations under federal civil rights law. Unlike other areas of commerce and regulation (e.g., housing, education, employment), Congress has not specifically addressed the protection of civil rights in the context of environmental regulation, which is heavily influenced by substantive, later-enacted federal statutes designed to protect public health regardless of race or socioeconomic status. ECRCO's apparent assertion that states must act outside of federally approved programs that meet federal standards to address long-standing, systemic disparities is untenable.

2. TCEQ response to accepted issue 2: In providing public participation during the 2021 CBPSP Amendment, TCEQ did not discriminate on the basis of national origin in violation of Title VI and 40 CFR Part 7.

A. TCEQ's CBPSP update provided public participation in compliance with TCEQ rules, and since the update, TCEQ has implemented additional plans for public outreach pursuant to the 2020 Informal Resolution Agreement (IRA).

The Complainants claim that TCEQ lacks procedural safeguards to ensure that it complies with general nondiscrimination obligations, including policies and procedures to ensure meaningful access to the permitting process. The complaints allege that TCEQ failed to comply with the IRA and Language Access Plan (LAP) obligations. Complainants fail to acknowledge that TCEQ's LAP was still in the development process when this permit change occurred. At the time of actions related to the CBPSP discussed in the complaints, TCEQ was working internally and with EPA to finalize the LAP. The agency met its own statutory and regulatory requirements when it made the minor change to the standard permit. Despite the Complainants' claims, TCEQ has been diligently working to update and improve its public participation processes, especially regarding accommodations for LEP communities.

The following is a partial list of changes that TCEQ has made since August 2021 relating to public participation and language access requirements:

In August 2021, TCEQ adopted changes to its public participation rules relating to alternative language requirements. These changes were fully implemented by May 1, 2022 and include increased visibility on agency websites for alternative language notices in public participation processes for permit applications subject to 30 TAC Ch. 39. The changes also include new requirements for alternative language notices to be posted on a new agency website, such as when an applicant may receive a waiver from newspaper publication due to lack of a suitable newspaper. Additionally, new requirements for interpreters for public meetings and translation of responses to comments and hearing requests have been implemented.

As part of the implementation of the agency's Public Participation Plan (PPP) and LAP, an agency-wide implementation team has been working diligently on various issues related to both public participation and language access. Pursuant to the PPP, the

*The Texas Commission on Environmental Quality's (TCEQ) Response to
Title VI Complaint Nos. 05RNO-22-R6 and 06RNO-22-R6*

agency has developed a formal Public Involvement Plan (PIP) requirement for certain types of permitting actions. TCEQ is also implementing the PIP requirement for other agency actions such as rulemaking and SIP attainment demonstrations and has been developing a more formal PIP form for these actions. While work on an agency-wide form is on-going, agency rulemakings have already begun to implement the general requirements of a PIP, including evaluation of the need for enhanced public participation opportunities and language access needs of communities.

Additionally, TCEQ is identifying types of documents that should be considered as vital and thus needing translation when LEP communities are involved. The agency is currently working on providing additional translated resources, including the agency's penalty policy and various agency websites related to a variety of types of information. The commission's list of items for the regular open meeting held by the agency's commissioners (i.e., the Commissioners' Agenda Meeting), has been translated into Spanish since January 2022. Instructions on the Commissioners Integrated Database, the primary website where interested persons can find filings on various permitting and enforcement items, are also translated into Spanish. TCEQ has also acquired a new resource for submitting comments on rulemakings and other such items. Effective September 1, 2022, this new software has allowed the agency to post Spanish language pages for rulemaking comments and has improved accessibility for all users on mobile platforms, including smartphones. TCEQ continues to work to improve accessibility and usability of agency resources, especially for LEP users.

Complainants also note that the agency has not completed the two in-person meetings about agency processes as required by the IRA, ignoring that the IRA allowed for some delay considering the on-going COVID-19 pandemic. While the agency has now resumed holding in-person meetings, these meetings have required extensive planning to meet the IRA's requirements, as well as advanced notice to the public. The two meetings are scheduled for November 1 and 2, 2022 and have been designed not only to meet the stated requirements of the IRA, but also to provide additional information for the public. The meetings will include an opportunity for the public to see and ask questions about certain mobile monitoring equipment, an informal "Ask an Expert" session in which various agency experts in different media will be available to provide information and answer questions, and formal presentations on information important to the public. Information about these meetings is available on the agency calendar¹¹ and on TCEQ's Title VI webpage.¹²

B. TCEQ considered public comments it received on the CBPSP update.

Although the Complainants contend that the public notice of the challenged action was deficient and ignored requirements, and that the agency continues to ignore the needs of affected communities, that is factually incorrect. The action in question was, despite the allegations of the complaints, a very minor change to the standard permit to correct an administrative error and ensure that the language of the permit was consistent with the agency's intent at the time of the 2012 amendment to the standard permit. The legal requirements for notice of a change to the standard permit were met.

¹¹ TCEQ, *Future Events*, <https://www.tceq.texas.gov/events>.

¹² TCEQ, *Title VI Compliance at TCEQ*, <https://www.tceq.texas.gov/agency/decisions/participation/title-vi-compliance>.

*The Texas Commission on Environmental Quality's (TCEQ) Response to
Title VI Complaint Nos. 05RNO-22-R6 and 06RNO-22-R6*

Complainants state that the agency continues to ignore the needs of LEP communities, without acknowledging that this allegation predates the agency's many substantive changes to its process for rulemaking and rulemaking-like activities.

TCEQ considered the substance of the voluminous public comments that were submitted on the administrative change that was made to the CBPSP. Although the bulk of those comments were outside the scope of that agency action, the agency has since taken further action to address those comments. The CBPSP is being re-opened for substantive changes. TCEQ has undertaken a new protectiveness review on the permit and has a comprehensive calendar of public participation opportunities scheduled. As this new action postdates the IRA's resolution and TCEQ's new processes for Commission adoption of rule and rule-like projects, the agency will be holding three stakeholder meetings regarding CBPSP amendments in November 2022 and will have Spanish-language interpreters at these meetings. The agency will solicit comments on the new protectiveness review. The notices and substantive information regarding the proposed amendment will also be provided in Spanish. The public meeting on the proposed changes will also have an interpreter available. Additionally, TCEQ has developed a website for the CBPSP amendments, in both English and Spanish, that will provide more information on the process and proposed changes.¹³ Finally, the agency is undertaking a separate rulemaking action to make changes to 30 TAC Chapter 116, Subchapter F to address a more general issue with the CBPSP. These two actions will occur in approximately the same general timeline, from proposal in late 2022 through adoption in late summer/early fall 2023.

TCEQ could not make these additional changes at the time of the 2021 amendment to the CBPSP, as the amendment was only noticed as a very simple and limited change to the standard permit to correct an administrative error. This was thoroughly explained when the agency acted on the standard permit.¹⁴

3. EPA has not implemented Title VI through regulations that require consideration of location and socioeconomic factors in the permitting process.

ECRCO has not promulgated specific regulations that would direct states on how they can ensure that there is no "disparate impact" from states' permitting programs. The guidance provided by ECRCO's "toolkit" is neither helpful in this context nor mandatory. Neither the FCAA nor EPA in its properly promulgated regulations, including 40 CFR § 7.35, requires a separate disparate impact analysis for individual actions under TCEQ and EPA permitting programs. TCEQ relies on the requirements in its own properly promulgated EPA-approved rules, which do not allow the consideration of factors such as the location of the permitted activity or

¹³ TCEQ, *2023 Amendment to the Concrete Batch Plant Standard Permit*, <https://www.tceq.texas.gov/permitting/air/newsourcereview/2023-amendment-concrete-batch-standard-permit>.

¹⁴ TCEQ, *Commission Approval for Adoption of Amendment to Air Quality Standard Permit for Concrete Batch Plants (Docket No. 2021-0493-MIS)*, https://www.tceq.texas.gov/assets/public/comm_exec/agendas/comm/backup/Agendas/2021/09-22-2021/0493MIS.pdf, Sep. 3, 2021.

**The Texas Commission on Environmental Quality's (TCEQ) Response to
Title VI Complaint Nos. 05RNO-22-R6 and 06RNO-22-R6**

socioeconomic status of surrounding communities in its evaluation of permit applications.¹⁵

EPA has promulgated regulations at 40 CFR Part 7 to implement the provisions of the Civil Rights Act of 1964. 40 CFR § 7.35(b) specifically states that “[a] recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.” However, even this regulation does not require that a state conduct a disparate impact analysis for every action that a state agency takes regarding its permitting programs. Such a requirement would be punitively resource-intensive, especially for a state such as Texas, which has a robust permitting program second only in scope to EPA’s.

Consistency is the bedrock foundation of administrative law and is relied on by both the public and the regulated industry. Texas cannot simply go beyond its own rules or make arbitrary changes to those rules or their implementation in an attempt to meet undefined and unfunded mandates. State regulatory agencies may only act in accordance with their authorizing statutes and validly enacted regulations. Failure to follow this law would leave states vulnerable to challenge from the regulated entities that are entitled to rely on these statutes and rules.

Federal and state laws and regulations require the standard permits to be protective of human health and the environment for all communities at the fence line. TCEQ applied all federal and state legal requirements in a non-discriminatory manner to ensure that the permitted facilities operate in a manner that is protective of human health and the environment. Emissions are controlled so that the facility may operate safely without harm to the public from those emissions at its fence line. This analysis confirms that all communities, including those closest to the plant, are protected.

4. TCEQ has a substantial legitimate justification for its policies.

If ECRCO determines that a *prima facie* case of disparate impacts exists, TCEQ will then have the opportunity to show that there is a substantial legitimate justification for the specific policies or practices at issue. TCEQ reserves its right to make that demonstration if ECRCO makes such a finding. TCEQ reiterates that it has received approval for its Title V and NSR permitting programs, consistent with the FCAA, and is justified in administering them.¹⁶ TCEQ’s Title V permitting regulations, as well as state and federal law, oblige the agency to issue permits after it has established that applicants have complied with applicable requirements.¹⁷

¹⁵ See, generally, 30 TAC Ch. 116 & 122; see also, THSC §§ 382.0518, 382.0541, 382.0543, & 382.055.

¹⁶ See, 40 CFR Part 70, Appendix A; 40 CFR § 52.2270.

¹⁷ See, THSC §§ 382.0518, 382.0541, 382.0543, & 382.055.

5. TCEQ asks ECRCO to administratively close the complaints.

For the above and following reasons, TCEQ requests ECRCO to administratively close the complaints.

First, the Complainants failed to state a violation of law that ECRCO can enforce. EPA first considered environmental justice issues after President Clinton signed Executive Order 12898 (EO 12898) in 1994. The purpose of EO 12898 was to evaluate the effects of federal action regarding environmental and human health on low-income and minority populations with the goal of ensuring environmental protection for all communities. EO 12898 directed the federal government to identify and address any disproportionate human or environmental effects on minority populations, develop a strategy to implement environmental justice, promote nondiscrimination, and provide public participation.

ECRCO was established by EPA to enforce federal civil rights laws, but enforcement of the FCAA is not in ECRCO's jurisdiction. The FCAA established the laws on which the Texas Clean Air Act and TCEQ rules are based. The Complainants' issues, along with ECRCO's letter accepting the complaints for investigation, center on complaints regarding TCEQ's minor NSR permit program, specifically TCEQ's CBPSP. Texas' EPA-approved program was created, and complies with, the FCAA. ECRCO does not have jurisdiction to rule on TCEQ's CBPSP because ECRCO does not have jurisdiction over the FCAA.

EPA Office of Enforcement and Compliance Assurance Acting Assistant Administrator Larry Starfield stated in an EPA Memorandum, "We need to ensure the protection of communities regardless of where a person lives."¹⁸ Accordingly, TCEQ's programs and permitting system were developed to treat all populations equally. TCEQ permitting programs evaluate the NAAQS set by EPA when developing air quality permits. The emissions rates and limitations allowed by the permits, in full compliance with the NAAQS, were found to be protective of human health of all populations and the environment at the facility fence line. TCEQ requests clarity and specific statutory authority regarding how Texas can be in full compliance with the NAAQS, yet still allegedly violate Title VI. EPA has the authority to review the NAAQS if the standards are not in compliance with Title VI.

Again, TCEQ does not have jurisdiction to consider items such as zoning, land use, and land value in the permitting process. Moreover, as stated at great length above, the Complainants have not specified sufficient factual grounds in their complaints, including establishing the causation element of a disparate impact analysis. The CBPSP protects all persons at the facility fence line.

Additionally, the same issues from the complaints have been filed with another federal, state, or local agency (a petition has been filed in Texas district court), and ECRCO should anticipate that the court will provide the Complainants with a

¹⁸ EPA, "Strengthening Enforcement in Communities with Environmental Justice Concerns" Memorandum from Lawrence E. Starfield, EPA Office of Enforcement and Compliance Assurance Acting Assistant Administrator, <https://www.epa.gov/sites/default/files/2021-04/documents/strengtheningenforcementincommunitieswiththejconcerns.pdf>, Apr. 30, 2021.

**The Texas Commission on Environmental Quality's (TCEQ) Response to
Title VI Complaint Nos. 05RNO-22-R6 and 06RNO-22-R6**

comparable resolution process. Once the Texas district court acts on the petition, the Complainants will have further remedies available to them.

Finally, TCEQ has begun new processes to make substantive changes to the CBPSP, as discussed above. These processes should be allowed to follow the normal course, as TCEQ works to address the substantive comments that it has received on its CBPSP. Accordingly, ECRCO should administratively close the complaints. In the alternative, TCEQ requests ECRCO abate its investigation until the current litigation over the same issues has been resolved and the new amendments to the CBPSP have had the opportunity to be resolved through the agency's standard permit amendment process.